HEIRS OF WILLIAM A. LISBOURNE ET AL.

IBLA 83-873 Decided May 22, 1987

Appeals from a decision of the Fairbanks, Alaska, District Office, Bureau of Land Management, denying requests to reinstate previously relinquished Native Allotment applications.

Set aside and remanded.

1. Alaska: Native Allotments -- Applications and Entries: Relinquishment

A duty to reexamine the circumstances of the relinquishment of a Native allotment application in the face of an allegation that it was involuntary and unknowing, notwithstanding the fact the land was subsequently conveyed out of Federal ownership, is founded on the special fiduciary responsibility of the Secretary of the Interior to Native Americans. Hence, a BLM decision refusing a petition by the heirs of a deceased Native allotment applicant to consider a previously relinquished application on the ground the relinquishment was involuntary and unknowing may be set aside and the case remanded to allow consideration of the circumstances of the relinquishment.

APPEARANCES: David C. Fleurant, Esq., Anchorage, Alaska, for appellants; Bruce Schultheis, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management; Lance B. Nelson, Esq., Anchorage, Alaska, for the State of Alaska; and Charles A. Dunnagan, Esq., Anchorage, Alaska, for Tigara Corp.

OPINION BY ADMINISTRATIVE JUDGE GRANT

The heirs of William A. Lisbourne and others have appealed from a July 12, 1983, decision of the Fairbanks District Office, Bureau of Land Management (BLM), denying their requests to reinstate the Native allotment

applications filed by certain Native allotment applicants who are now deceased. 1/

Each of the applications had been relinquished by the applicant and BLM held they could not be reinstated at the request of an heir of a deceased applicant, citing Mary Olympic (On Reconsideration), 65 IBLA 26 (1982).

Consideration of this case was stayed by the Board pending judicial review of the Olympic case. Subsequent to the court decision, counsel for appellants and BLM filed a joint request for remand to permit reconsideration of the reinstatement requests. The motion was denied as a preliminary matter by Order of the Board dated October 2, 1985, in light of the fact the lands had been conveyed out of Federal ownership prior to enactment of section 905 of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634 (1982), and the apparent lack of authority in the Department to reinstate the applications for conveyed lands, citing the prior Board decisions in Peter Andrews (On Reconsideration), 83 IBLA 344 (1984), and Kenai Natives Association, Inc., 87 IBLA 58 (1985). The order called upon the parties to brief the question of whether Congress intended ANILCA to legislatively approve previously relinquished Native allotment applications where the land sought was conveyed to a Native corporation prior to passage of ANILCA.

In response to the briefing order, counsel for BLM asserts that the precedent established in Aguilar v. United States, 474 F. Supp. 840 (D. Alaska 1979), requires reinstatement of the applications for the purpose of determining whether the relinquishments were knowing and voluntary and whether court proceedings are necessary to seek to recover the land. Counsel for BLM asserts that section 905 of ANILCA does not operate to legislatively approve relinquished Native allotment applications where the land was conveyed out of Federal ownership prior to ANILCA.

[1] Subsequent to the briefing in this case, the Board decided the case of Matilda Titus, 92 IBLA 340 (1986), following Aguilar and overruling Kenai Natives Association, Inc., supra, and Peter Andrews (On Reconsideration), supra, in part. In Matilda Titus, supra, the Board held:

> Where lands described in a previously relinquished Native Allotment application are patented to another, and the applicant requests reinstatement of the relinquished application, the Department has a duty to a Native Allotment applicant to

1/ BLM's decision denied reinstatement of the following Native allotment applications:

Serial No.	Applicant
F-13136	William A. Lisbourne, Sr.
F-13386	Beatrice M. Vincent
F-13471	Ruth Nash
F-16712	Sunshine E. Tuckfield
F-16736	Edward N. Killigvuk
F-16737	Jimmie A. Killigvuk
F-16742	George Omnik
F-18816	Stanley K. Solomon
F-19022	Herbert Kinneeveauk

> make a preliminary investigation and determination regarding whether the relinquishment was voluntary and knowing. If it was not, the application should be reinstated and, if deemed appropriate, the Department should pursue recovery of such lands.

92 IBLA at 340. The duty to reexamine the circumstances of relinquishment is predicated on the Secretary's special fiduciary responsibility to Native Americans, in this case Native Alaskans (i.e., Indians, Aleuts, or Eskimos), rather than on grounds of a statutory grant under section 905(a)(1) of ANILCA. The Secretary of the Interior and his delegates are properly considered to be under a fiduciary duty to examine the circumstances of any purported relinquishment by a Native allotment applicant and ascertain whether it is knowing and voluntary. See Aguilar v. United States, supra; State of Alaska v. Thorson (On Reconsideration), 83 IBLA 237, 91 I.D. 331 (1984). "The protection of Indian property rights is an area where the trust responsibility has its greatest force." Aguilar v. United States, supra at 846 (citations omitted).

We agree, however, with the statement of counsel for BLM that the heirs of an applicant "have the burden of proof" in the Aguilar proceeding, and that "it will be a heavy one since the issue turns largely on their decedent's state of mind." See Olympic v. United States, 615 F. Supp. 990, 995, (D. Alaska 1985); 2/ Peter Andrews, Sr. v. Bureau of Land Management, 93 IBLA 355 (1986).

Accordingly, we now find the motion for remand to be well founded.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the cases are remanded.

C. Randall Grant, Jr.
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge.

2/ "I recognize, as does Olympic in her supporting papers, that an heir may face a difficult or impossible task in proving the intent of the original applicant." 615 F. Supp. at 995.

ADMINISTRATIVE JUDGE ARNESS DISSENTING:

The majority remands this appeal to BLM for further consideration because of the Department's "fiduciary duty to examine the circumstances of any purported relinquishment by a Native allotment applicant and ascertain whether it is knowing and voluntary." The majority bases its action on the Board's decision in Matilda Titus, 92 IBLA 340 (1986), a case in which a Native allotment applicant had submitted an affidavit stating "she has no present recollection of intentionally giving up any rights to" her allotment. In Titus, there was a genuine issue of material fact concerning the authenticity of the relinquishment document which the Board found to be suspect on its face. Factual issues concerning the authenticity of the relinquishment document supposedly given by Titus had to be resolved before the Department could conclude as a matter of law whether the relinquishment was knowing or voluntary.

Unlike Titus, this appeal presents no genuine issue of material fact in dispute. If the factual allegations contained in the affidavits submitted by appellants are taken as true (and I see no reason to doubt them), they are not legally sufficient to support the conclusion that the relinquishments were neither knowing or voluntary, as this opinion will demonstrate. As a consequence, this appeal presents only a question of law, a matter which this Board is competent to determine without remanding the case to BLM.

In each case involved in this appeal, the relinquishment was submitted on a typewritten form letter addressed to Thomas Dean at BLM's office in Fairbanks. The form letter stated as follows (with the blanks filled in with information appropriate to each case):

> I had previously filed for a Native Allotment, serial number ___, located at ____ _. After consulting the Tigara Corporation I find it to be in my own interest to withdraw my application for a Native allotment.
>
> Please consider my Native Allotment to be formally withdrawn as of ___, Month, ___, Day, ____Year.

Relinquishments for eight of the applications involved in this appeal were dated January 14, 1974, and were filed with BLM on March 15 of that year. 1/ The relinquishment of the remaining application, F-19022, was dated September 17, 1974, and was filed on September 23, 1974.

1/ Stanley Solomon's relinquishment dated Jan. 14, 1974, for application F-18816 did not describe the correct land. Solomon filed a second relinquishment on a BLM form on May 5, 1975.

No question has been raised concerning the authenticity of the relinquishment documents such as occurred in Matilda Titus, supra. In each of these cases, the relinquishments appear to have been signed by the same person who signed the initial application.

In support of their contention that the Native allotment applicants did not intend to relinquish their allotments, appellants have submitted affidavits in which they refer to instances when the applicants expressed a continued interest in retaining, using, or transferring the land. If these relinquishments constituted a complete abandonment of any claim to the land such as did the relinquishment filed in the Titus case, these allegations, if true, would provide a legally sufficient basis for concluding that the relinquishments were not knowing or voluntary. But if the applicants expected a conveyance by some other means of the same lands they would have obtained by way of Native allotment, then these statements have no probative force whatever in determining whether the relinquishment was knowing or voluntary.

Although our order of October 2, 1985, directed the parties' attention to the effect of the conveyance to Tigara, all of the parties overlooked this crucial provision of that conveyance:

> THE GRANT OF THE ABOVE-DESCRIBED LAND IS SUBJECT TO:
> * * * * * * *
>
> 3. Requirements of section 14(c) of the Alaska Native Claims Settlement Act, 85 Stat. 688, 703, 43 U.S.C. 1613(c) that the grantee hereunder convey those portions of land hereinafter granted, as are prescribed in said section * * *.

When Tigara received a conveyance pursuant to 43 U.S.C. § 1613(a), it became obligated under 43 U.S.C. § 1613 (c)(1) to "convey to any Native or non-Native occupant, without consideration, title to the surface estate in the tract occupied as primary place of residence, or as a primary place of business, or as a subsistence campsite, or as a headquarters for reindeer husbandry" [Emphasis added]. Heirs of Doreen Itta, 97 IBLA 261, 266 (1987). 2/

2/ In Itta, supra at 266-67 n.5, we noted:

"As originally enacted, this provision did not expressly state that the right to reconveyance vested on December 18, 1971, the date of enactment, although one could fairly infer that such was the legislature's intent. Any doubt was eliminated upon enactment of ANILCA in 1980, when Congress amended the provision by inserting the following clause after the word 'occupied': 'as of December 18, 1971 (except that occupancy of tracts located in the Pribiloff Islands shall be determined as of the date of initial conveyance of such tracts to the appropriate Village Corporation).' P.L. 96-487, § 1404(a), 92 Stat. 2493, (Dec. 2, 1980); 43 U.S.C. § 1613(c)(1) (1982).

The affidavit of Douglas Minton, offered in support of reopening the application of Stanley Solomon, F-18816, provides explicit evidence that when Tigara obtained relinquishments from Native allotment applicants, those applicants understood they were not losing their rights to the land:

> I remember when STANLEY SOLOMON received a letter from the Tigara Corporation of Point Hope in 1974, asking him to give up his allotment application. He agreed to do that because he thought the village corporation would give him his land. I clearly remember that he always wanted to have the land he applied for.

Thus, these relinquishments were clearly knowing and voluntary. They were made to facilitate the conveyance of the claimed lands by other means.

Another difficulty posed by the majority's disposition is its reliance upon the Department's fiduciary duty to the Native allotment applicant, quoting Aguilar v. United States, 474 F. Supp. 840, 846 (D. Alaska 1979): "The protection of Indian property rights is the area where the trust responsibility has its greatest force." The Aguilar case involved a Native allotment application for land patented to the State of Alaska. This appeal, however, involves Native allotment applications for land conveyed to a Native village. Granting that "the protection of Indian property rights is the area where the trust responsibility has its greatest force," does the Department's fiduciary duty extend to the Native allotment applicant to the exclusion of the interests of the Native village corporation to which BLM has already conveyed title to the land?

Perhaps the following submission from Tigara Corporation received on November 8, 1985, obviates the need to answer this question in this appeal; but it raises a number of other questions:

> The Tigara Corporation does not oppose the reinstatement of the 9 native allotment cases affected by the Interior Board of Land Appeals' order and dated October 2, 1985. On December 19, 1984, the Bureau of Land Management stated that it would credit the Tigara Corporation entitlements for the amount of acres it reconveyed to BLM in order to grant certificates to native allotment applicants in the Point Hope area. With this assurance, the Tigara Corporation hopes that all relinquished native allotment claims in the Point Hope area will be reinstated so that the applicants may have the opportunity to qualify for their allotment. The Tigara Corporation is anxious that all of its members who have applied and meet the qualifications for native allotments

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fn. 2 (continued)
Except for the provision respecting the Pribiloff Islands, we construe the amendment as a clarification of an ambiguity in existing law rather than as a change in existing law. See S. Rep. No. 413, 96th Cong., 2d Sess. 311 (1979), reprinted in 1980 U.S. Code Cong. & Admin. News 5255.

I comment on this issue only because several applicants died after relinquishing their allotments, but before the conveyance to Tigara.

> be granted their allotments. Toward that end, the Tigara Corporation has committed itself to relinquishing those lands granted to successful allotment applicants in consideration of additional acreage being made available by the BLM so that its full entitlement remains undiminished.

(Tigara Response to Order at 1).

Of course, if Tigara carried out its obligations under 43 U.S.C. § 1613(c)(1), it would receive no credit for acreage reconveyed thereunder. Given the extent of Tigara's involvement in obtaining the relinquishments, are we to conclude that Tigara deceived the applicants whose successors in interest have brought this appeal? Such a finding would be required, because BLM has no authority to reinstate a relinquished application unless the application was not "knowingly and voluntarily relinquished." See Matilda Titus, supra. If so, would it be proper to credit Tigara's entitlement for the acreage reconveyed if the relinquishments were obtained under circumstances tantamount to fraud?

Appellants offer the following allegation concerning BLM's consideration of relinquished applications:

> BLM has interpreted the provisions of Sections 905(a)(1) and (a)(6) as addressing applications wherein the land described was conveyed prior to ANILCA. In the Point Hope area alone, BLM has reinstated in excess of 60 previously relinquished Native allotment applications describing over 100 parcels of land interimly [sic] conveyed to the Tigara Corporation in 1977. (I.C. 050). * * * 1. BLM notifies interested parties of the reinstatement and has devised a 90-day period within which the parties can file protests in accordance with Section 905(a)(5) of ANILCA. If a protest is not timely filed and the other enumerated exceptions are not applicable, the Native allotment application is legislatively approved. The corporation, in effect, waives its interest in the subject land by waiving its right to file the protest. In accordance with Congressional intent, the corporation's waiver obviates the need for an administrative adjudication of the claim and expedites the ANCSA conveyance process.

Appellants' Response to Order, at 8. According to appellants, BLM will not question whether a relinquished allotment application warrants reinstatement unless a protest is filed. BLM only disputes the foregoing insofar as it suggests that ANILCA can extend to legislatively transfer previously conveyed lands (BLM Reply to Appellant's Brief).

Although appellants appear here as successors in interest to deceased applicants, some had relinquished their own applications which were later reinstated. By provision of ANILCA, reinstatement of relinquished applications was limited by Congress to circumstances where the relinquishment was not knowing or voluntary. There is no evidence that Congress intended this provision to become a mechanism whereby Native village corporations could evade their reconveyance responsibilities under 43 U.S.C. § 1613(c)(1) and

correspondingly enlarge their entitlements. If appellants' contentions are to be believed, BLM has assisted this perversion of the process for reinstating relinquished allotments, by applying a far less rigorous standard in determining whether a relinquishment is knowing or voluntary than this Board has ever countenanced, or by failing to adjudicate this question at all in the absence of a protest. Unlike the majority, I am unwilling to facilitate this process by remanding this case.

Although the conveyance in Titus, supra, was also subject to the reconveyance requirements of 43 U.S.C. § 1613(c)(1), the relinquishment letter allegedly signed by Titus disavowed any occupancy of the land so that there could have been no reconveyance. In Titus, there were two circumstances which are not present in the instant appeal. First, there is the inconsistency between the relinquishment and the applicant's intent to remain on the land, an element which does not appear in this case because the relinquishments here did not disavow the occupancy necessary for a right to reconveyance. Second, the drafting and signature on the relinquishment document in Titus raised doubt about its authenticity. No such issues have been raised in these appeals.

In these cases we should follow the approach taken by the Board as an alternative ground for affirming the rejection of Native allotment applications which conflict with interim conveyances issued prior to ANILCA:

> Were BLM to consider further these Native allotment applications, the sole purpose would be for the initiation of a suit to cancel the conveyance to Ukpeagvik Inupiat so that BLM could reconvey the land to appellants. But appellants have made no effort to enforce the provision in Ukpeagvik Inupiat's conveyance which requires Ukpeagvik Inupiat to reconvey the land, even though they may have a right to such a reconveyance. There is no reason for BLM to seek cancellation of this conveyance if enforcement of the provisions of the grant to the corporation could result in a conveyance from Ukpeagvik Inupiat to appellants.

Heirs of Doreen Itta, supra at 267. The same result should be reached in these cases.

Accordingly, I dissent.

Franklin D. Arness,
Administrative Judge.